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No. 79-1801

In the Supreme Court of the United States

OCTOBER TERM, 1979

LIBBEY-OWENS-FORD COMPANY, PETITIONER

v.

SHERRY EIRHART AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
VELLA M. FINK
Attorneys
Equal Employment Opportunity Commission
Washington, D.C. 20506

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QUESTION PRESENTED

Whether a 1971 consent decree, which terminated an employment discrimination action brought against petitioner by the Department of Justice and permitted petitioner to impose certain height and weight requirements for employment as its Toledo, Ohio manufacturing plants, constitutes a "written interpretation or opinion" of the Equal Employment Opportunity Commission within the meaning of Section 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b), and therefore immunizes petitioner from liability for having imposed the same height and weight restrictions at its Ottawa, Illinois facilities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 616 F. 2d 278. The opinion of the district court (Pet. App. 10a-22a) is reported at 482 F. Supp. 357.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1980. The petition for a writ of certiorari was filed on May 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In August 1976 respondent Sherry Firhart brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that she had been discriminated against because of certain height and weight qualifications that petitioner Libbey-Owens-Ford Company ("Ford") had imposed for employment at its Ottawa, Illinois facilities. Thereafter, in May 1978, the Equal Employment Opportunity Commission ("Commission") filed an action challenging the same height and weight requirements. Both actions were brought in the United States District Court for the Northern District of Illinois, and they were consolidated in September 1978 (Pet. App. 3a).

On cross-motions for summary judgment, Ford asserted that it was immune from liability under Section 713(b) of Title VII, 42 U.S.C. 2000e-12(b), on the ground that it had maintained the restrictions in reliance upon a 1971 consent decree concluding another Title VII suit that the Justice Department had brought concerning Ford's Toledo, Ohio plants. The Toledo decree permitted the use of certain minimum height and weight requirements at those plants (Pet. App. 2a, 12a).

The Toledo lawsuit resulted from a charge of employment discrimination that had been filed with the Commission in 1968. The charge alleged that female employees had been restricted to two departments containing lower paying jobs and that seniority lists, that were segregated on the basis of sex, were being maintained at Ford's "Plant 8" in Toledo. The Commission found reasonable cause to believe that the charge was true, and ultimately unsuccessful conciliation efforts followed. On February 4, 1970, while conciliation negotiations were on-going, Ford imposed minimum height and weight requirements for entry level jobs at Plant 8 (Pet. App. 2a).

The Commission, whose statutory authority was then limited to investigation and conciliation, referred the case to the Justice Department after the conciliation efforts had failed.[1] On July 20, 1970, the Department filed a lawsuit alleging that Ford maintained a pattern and practice of discrimination against women at its Toledo, Ohio plants. The complaint did not refer to height and weight restrictions. *United States* v. *Libbey-Owens-Ford Co.*, No. C-70-212 (N.D. Ohio) (Pet. App. 2a, 8a). On February 3, 1971, the parties entered into a twenty-one page consent decree which provided special transfer, seniority and promotion rights for women employees at Plant 8 (Pet. App. 9a). The consent decree also contained a general provision concerning hiring at "all Toledo area plants." The provision required that hiring be "nondiscriminatory" but allowed Ford to retain a 5'4"

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[1]On November 20, 1974, more than three years after the decree was entered, the Commission was substituted to monitor compliance with the Toledo consent decree. The substitution occurred pursuant to the 1972 amendments to Title VII, which transferred the functions of the Attorney General to the Commission. Sections 707(c) and 707(d) of Title VII, 42 U.S.C. 2000e-6(c) and 42 U.S.C. 2000e-6(d) (Pet. App. 7a).

height restriction and a weight restriction "for females" of 110 pounds (Pet. App. 2a-3a).[2] In December 1970, prior to the entry of the consent decree, Ford had imposed the same height and weight restrictions at its Ottawa, Illinois plants (Pet. App. 3a).

Section 713(b) of Title VII, 42 U.S.C. 2000e-12(b), provides that "no person shall be subject to any liability * * * if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *." Since the enactment of Title VII, the Commission's regulations have consistently construed Section 713(b) to provide that only "a letter entitled 'opinion letter' and signed by the General Counsel" or "matter published and specifically designated * * * in the Federal Register" will constitute such a "written interpretation or opinion of the Commission." 29 C.F.R. 1601.33 (formerly 29 C.F.R. 1601.30; 30 Fed. Reg. 8409 (1965)).

The district court granted Ford's motion for summary judgment, however, holding that the hiring requirements provision of the Toledo consent decree constituted a "written interpretation or opinion of the Commission" within the meaning of Section 713(b) of Title VII (Pet. App. 10a-22a). The court noted that "[t]he Consent Order, by its own terms, applies only to the Company's Toledo area plants," but concluded that the company was

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[2]The decree provided in pertinent part that "Hiring in all Toledo area plants shall be carried out in a non-discriminatory basis. Minimum physical and non-physical requirements for entry level jobs, which were in writing as of February 4, 1970, shall continue to be applicable to both males and females seeking employment with the Company, except that the minimum weight requirement for females shall be 110 pounds" (Pet. App. 12a).

immune from liability because it could justifiably rely on the decree in imposing the restrictions at its Ottawa, Illinois plants (Pet. App. 19a).

The court of appeals reversed, holding that "[i]t would not be appropriate for this Court to expand the narrowly drawn Congressional grant of immunity contained in Section 713(b) to include * * * a [consent] decree" (Pet. App. 4a). The court noted that "[s]uch a compromise and product of bargaining skill between two parties cannot be deemed to be an 'order or opinion' of either of the parties" (Pet. App. 4a).[3] Moreover, the Commission's regulations defining a binding order or opinion were reasonable and should have been followed by the district court (Pet. App. 6a-7a).

ARGUMENT

The decision below warrants no further review; it is correct and consistent with the construction adopted by every court of appeals that has considered the question presented.

1. Since 1965, the Commission has recognized that agency expressions of "opinion" may take various forms. The Commission has consistently and expressly provided in its regulations, therefore, that only those "opinions" that are contained in officially designated opinion letters of the Commission's general counsel or in other materials published and so designated in the Federal Register, will provide the requisite basis for a Section 713(b) defense. See 29 C.F.R. 1601.33. Because good faith reliance on a Commission opinion provides a complete defense under Section 713(b), every court of appeals that has considered

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[3]The court of appeals also concluded that "any legal effect of the [consent] order on the EEOC would be * * * relevant only to a *res judicata* or collateral estoppel argument" (Pet. App. 8a). No such argument was made in the court of appeals.

the question has determined that the defense may be invoked only on the basis of opinions conforming to the Commission's regulation. See *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1200-1201 (7th Cir.), cert. denied, 404 U.S. 991 (1971) (General Counsel "letter of opinion" which did not meet the requirements of the Commission's guideline not a proper basis for a Section 713(b) defense); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 801 (4th Cir.), cert. denied, 404 U.S. 1006 (1971) (determination of "no reasonable cause" not an interpretation under Section 713(b)); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980, 997 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) (letters and statements by Commission officials not a basis for a Section 713(b) defense). See also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 423 n.17 (1975) (Section 713(b) provides "a complete, but very narrow, immunity"). As the Seventh Circuit explained in *Sprogis* v. *United Air Lines, Inc.*, *supra*, 444 F. 2d at 1200, the Commission's regulation "reasonably confines reliance justified under Section 713(b) to considered official expressions of opinion taking two specifically defined forms."

2. The court of appeals, relying on this Court's decision in *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971), correctly concluded that a consent decree cannot be deemed an interpretation or opinion of the law by either party (Pet. App. 4a). As this Court explained in *Armour*, *supra*, a consent decree is a pragmatic compromise whose scope must be discerned within its four corners, and whose terms are the product of relative "bargaining power and skill." Moreover, consent decrees "should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce * * *." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975).

Petitioner's reliance on a footnote in the district court's opinion in *EEOC* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 1022, 1055 n.34 (E.D. Pa. 1976), aff'd, 556 F. 2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978), is misplaced. That footnote does not establish that a consent decree will automatically constitute a binding interpretation providing nationwide immunity as to every kind of employment practice mentioned in the decree.[4] As part of the settlement in *American Telephone*, the employer negotiated for and obtained "opinion letters" from the Commission's general counsel, in which the Commission stated that certain of the decree's remedial provisions were lawful and that the letters could be relied upon under Section 713(b). Accordingly, the district court noted that the consent decree "and its accompanying documents" constituted an interpretation or opinion of the Commission. 419 F. Supp. at 1055 n.34. Here Ford did not bargain for or receive separate opinion letters upholding its use of height and weight restrictions nationwide. Cf. 29 C.F.R. 1601.31, 1601.32.

Moreover, Ford disregards the critical fact that the Toledo consent decree specifically provides that it is applicable only to Ford's "Toledo area plants." As Ford properly notes, the Toledo decree "reflects a thorough consideration * * * [by] the U.S. Department of Justice and [Ford] of the potential situations to which it will apply * * *" (Pet. 15). Contrary to Ford's argument, therefore, the present suit, which covers only Ford's Illinois plants, does not subject the company to potential liability "based on the very employment procedures

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[4]It would be particularly anomalous, in light of this Court's subsequent decision in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), if the Toledo consent decree were deemed a Commission opinion that the employment practices mentioned therein are categorically "in conformance with Title VII" (Pet. 16).

mandated in [the] Consent Order" (Pet. 19).[5] Indeed, Ford's argument is a transparent attempt to expand the operation of the 1971 consent decree and take advantage of certain terms, which Ford now considers to be favorable, by applying those terms to its nationwide activities, rather than to the limited local area that was the subject of the bargaining that led to that decree. Just as this Court has refused to extend consent decrees beyond their terms at the request of the government, see, e.g., *United States* v. *Armour & Co.*, *supra*, the court of appeals properly refused to extend the Toledo consent decree beyond its terms through the use of Section 713(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
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[5]Contrary to petitioner's assertion (Pet. 13 n.2), the decision below does not subject petitioner to conflicting or inconsistent judgments. This case involves two Ottawa, Illinois plants; the 1971 consent decree applies only to the Toledo, Ohio plants.